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18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA

20 UNITED STATES OF AMERICA,

Case No. 3:16-cr-00462 CRB

21 Plaintiff,

SUBMISSION BY HEWLETT-PACKARD
 COMPANY RE RELEASE OF MAY 29, 2012
 INTERVIEW SUMMARY

22 vs.

23 SUSHOVAN HUSSAIN,

Place: Courtroom 6, 17th Floor

24 Defendant.

Judge: Hon. Charles R. Breyer

Date Filed: November 10, 2016

Trial Date: February 26, 2018

1 At the conclusion of the February 26, 2018 proceedings, the Court stated that it was
 2 releasing to defense counsel an unredacted copy of notes prepared by HP in-house counsel which
 3 documented the May 29, 2012 interview of Mike Sullivan (“HP May 29, 2012 Sullivan Notes”)
 4 on the grounds that the notes qualify as Jencks Act material. Non-party Hewlett-Packard
 5 Company (“HP”) respectfully submits that this document—and other HP witness interview notes,
 6 memoranda and summaries, which were previously filed *ex parte* and under seal in this action—
 7 do not constitute Jencks Act material.

8 The Jencks Act authorizes courts to “order the United States to produce any statement (as
 9 hereinafter defined) of the witness **in the possession of the United States** which relates to the
 10 subject matter as to which the witness has testified.” *See* 18 U.S.C. § 3500(b) (emphasis added).
 11 However, HP never produced the HP May 29, 2012 Sullivan Notes to the United States
 12 Attorney’s Office (“USAO”) or any other agency of the federal government. Inasmuch as this
 13 document and all of the other interview notes, memoranda and summaries that HP filed *ex parte*
 14 and under seal on January 11, January 24, and February 6, 2018 are not, and have never been, “in
 15 the possession of the United States,” they are not Jencks Act materials within the meaning of the
 16 statute.¹ *See* 18 U.S.C. § 3500(b); *see also United States v. Fort*, 472 F.3d 1106, 1117 (9th Cir.
 17 2007) (“[T]he text of the statute requires that the government disclose all witness statements . . .
 18 *in the actual possession of the federal government at the time of the trial.*”) (emphasis added).

19 Furthermore, the HP May 29, 2012 Sullivan Notes are privileged attorney work product.
 20 As set forth in HP’s Amended Motion to Quash Subpoena Issued to Non-Party Hewlett-Packard
 21 Company Pursuant to Rule 17(c), HP’s in-house legal counsel prepared the HP May 29, 2012
 22 Sullivan Notes and certain other witness interview notes, memoranda and summaries in
 23 anticipation of litigation with Mr. Hussain and other former Autonomy executives shortly after
 24 they departed HP. *See* ECF 110, at 21-22. The HP May 29, 2012 Sullivan Notes and other
 25 interview materials contain the thoughts and impressions of the interviewing attorneys and thus

26
 27 ¹ The exhibits submitted on January 11 and January 24, 2018 were completely withheld on
 28 privilege grounds and have not been produced by HP to any third party. The exhibits submitted
 on February 6, 2018 were produced to the government, but in redacted form. Therefore, the
 redacted portions of the February 6 exhibits are not in the possession of the government.

1 are pure attorney work product. *See Upjohn Co. v. United States*, 449 U.S. 383, 399-400 (1981);
 2 *United States v. Nosal*, No. CR-08-0237 EMC, 2013 WL 1402336, at *2-3; *O'Connor v. Boeing*
 3 *N. Am., Inc.*, 216 F.R.D. 640, 643 (C.D. Cal. 2003).

4 HP articulated this and additional bases for withholding the HP May 29, 2012 Sullivan
 5 Notes and all other interview materials prepared by HP in-house lawyers in its submission
 6 accompanying those documents, which it lodged under seal and *ex parte* on January 11, 2018.
 7 Because HP asserted privilege, the HP May 29, 2012 Sullivan Notes have not been produced to
 8 the USAO and, to HP's knowledge, are not in the government's possession today. Accordingly,
 9 they do not constitute Jencks Act material and should not be released to defense counsel.

10 If the Court has released the HP May 29, 2012 Sullivan Notes, HP asks the Court to issue
 11 an order stating that the production is not an express or implied waiver of HP's attorney client
 12 privilege or attorney work product protection. *See Fed. R. Evid. 502(b), (d)*. HP is prepared to
 13 clarify or expand upon any matters concerning its privilege assertions.

14 Dated: February 27, 2018

15 Respectfully submitted,

16 By /s/ Kurt B. Oldenburg

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